88-1686

No. _____

Supreme Court, U.S.
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CLERK

In The

Supreme Court of the United States

October Term, 1988

THE COLORADO DEPARTMENT OF SOCIAL SERVICES,

Petitioner,

v.

KIMBERLY A. OBERT,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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ISSUE PRESENTED FOR REVIEW

Whether 42 U.S.C. § 602(a)(22) (1986) which provides that a state "will promptly take all necessary steps to correct any . . . underpayment of aid" pursuant to the Aid to Families with Dependent Children program requires a state to grant a recipient's untimely request for a hearing on an alleged underpayment of aid, particularly in light of 45 C.F.R. § 205.10(a)(5)(iii) (1987) which provides, in pertinent part, that the recipient "shall be provided a reasonable time, not to exceed 90 days in which to appeal an agency action . . . "

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY AND REGULATORY PROVISIONS 1

STATEMENT OF THE CASE 2

HOW THE FEDERAL QUESTION WAS RAISED ... 4

REASONS TO ISSUE WRIT 7

CONCLUSION 9

APPENDIX ..... App. 1

Cases

Edwards v. McMahon, 834 F.2d 796 (9th Cir. 1987). 7, 8, 9

Tambe v. Bowen, 839 F.2d 108 (2nd Cir. 1988) ... 7, 8, 9

Statutes

28 U.S.C. § 1257(3) (1982) 1

42 U.S.C. § 602(a)(4) (1986) 1, 9

42 U.S.C. § 602(a)(22) (1986) 1, 4, 5, 7, 8, 9

Rules

45 C.F.R. § 205.10(a)(5)(iii) (1987) 2, 7, 8, 9

45 C.F.R. § 233.20(a)(13) (1987) 4, 7

45 C.F.R. § 233.20(a)(13)(ii) (1987) 2, 5, 7, 8

OPINIONS BELOW

The final agency decision is included as Appendix A; the district court's ruling is included as Appendix B; the Colorado Court of Appeals' opinion, which is reported at 746 P.2d 1379 (Colo. App. 1987), is included as Appendix C; the Colorado Supreme Court's opinion is reported at 766 P.2d 1186 (Colo. 1988) and is included as Appendix D; and, the Colorado Supreme Court's denial of the petitions for rehearing is included as Appendix E.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) (1982).

The judgment of the Colorado Supreme Court was entered on December 19, 1988. The timely petitions for rehearing by both parties were denied on January 17, 1989 at which time the Colorado Supreme Court modified its opinion.

STATUTORY AND REGULATORY PROVISIONS

42 U.S.C. § 602(a)(4) and (a)(22) (1986) state, in pertinent part:

> A state plan for aids and services to needy families with children must
>
> . . . .
>
> (4) provide for granting an opportunity for a fair hearing before the State agency to any individual

> whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness . . .
>
> (22) provide that the State agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State plan . . .

45 C.F.R. § 205.10(a)(5)(iii) (1987) provides, in pertinent part:

> An opportunity for a hearing shall be granted to any . . . recipient who is aggrieved by any agency action resulting in suspension, reduction, discontinuance, or termination of assistance . . .
>
> (iii) The claimant shall be provided reasonable time, not to exceed 90 days, in which to appeal an agency action . . .

45 C.F.R. § 233.20(a)(13)(ii)(1987) requires the states to:

> Specify uniform Statewide policies for prompt correction of any underpayments . . . Underpayment means a financial assistance payment received by or for an assistance unit for the payment month which is less than the amount for which the assistance unit was eligible, or failure by the State to issue a financial assistance payment for the payment month to an eligible assistance unit if such payment should have been issued . . .

STATEMENT OF THE CASE

Kimberly A. Obert received Aid to Families with Dependent Children (AFDC) benefits from the Arapahoe County Department of Social Services (County Department) from July 1982 through December 1982. The amount of AFDC benefits payable to Obert was based upon a determination by the County Department, relying

on Obert's statements in her application, that her shelter, utilities and food were being supplied to her, in full, by her parents.

On December 2, 1982, the County Department advised Obert that her AFDC benefits would be terminated because she had failed to provide the County Department with a copy of her son's social security card (r. p. 30). The notice form also advised Obert that, if she wished to appeal the termination, she could either appear at a specified date and time for a county evidentiary hearing or file a written appeal within 26 days. Obert did not appear at the county evidentiary hearing nor did she file a written appeal within the prescribed time period.

Obert reapplied for AFDC on or about February 10, 1983. A notice was mailed to Obert on March 17, 1983 informing her that she was not eligible for benefits due to excess resources (r. p. 39). The notice also advised Obert that, if she wished to appeal the denial of assistance, she could appear at a specified date and time for a county evidentiary hearing or file a written appeal directly to the state within 26 days. Obert failed to appear at the county evidentiary hearing and failed to file a written appeal with the state within the prescribed time period.

A written appeal was filed with the state on October 9, 1984, almost 2 years after the first advance notice was issued (r. p. 43). The appeal alleged that the termination of her AFDC benefits on December 2, 1982 and her denial of AFDC benefits on March 17, 1983 were erroneous. A state administrative hearing officer rendered a decision dismissing Obert's appeal as untimely.

On November 12, 1985, the district court judge for the City and County of Denver affirmed the decision of the hearing officer holding that Obert's appeal was not timely. On July 16, 1987, the Colorado Court of Appeals affirmed the district court's decision. The Colorado Supreme Court granted Obert's petition for writ of certiorari by order dated December 14, 1987. The Colorado Supreme Court issued its opinion affirming in part and reversing in part the decision of the Colorado Court of Appeals on December 19, 1988. On January 17, 1989, it modified its opinion and denied the petitions for rehearing filed by Obert and the Colorado Department of Social Services. In brief, the Colorado Supreme Court held that terminations and denials of benefits were subject to the time limitations for appeals but a benefit amount less than the full amount is an "underpayment" under 42 U.S.C. § 602(a)(22) (1986) and, thus, subject to no time limits within which to appeal.

HOW THE FEDERAL QUESTION WAS RAISED

The question of whether the federal statute requires the state to grant a recipient's untimely request for a hearing on an alleged underpayment of aid was raised by Obert in her complaint for judicial review of the agency decision of the Colorado Department of Social Services. The district court ruled that:

> Plaintiff admits she failed to appeal within the time limits of 9 C.C.R. 2503.1 section 3.850.11(b), but argues that 45 C.F.R. 233.20(a)(13) requires that the county department promptly correct the underpayments made to her despite her failure to appeal . . .

> Limitation of rights within reasonable time frames is not inconsistant (sic) with any federal or state statutes or federal or state regulations.
>
> On the other hand, the time limits here are completely consistant (sic) with the right to a fair agency hearing under U.S.C. section 602(a)(5) (sic), 45 C.F.R. section 205.10 and 9 C.C.R. 2503-1 section 3.850.11.

(Appendix B, pp. App. 12-13.)

In the decision of the Colorado Court of Appeals, the court framed the issue as

> whether recipients of Aid to Families with Dependent Children (AFDC) benefits can seek correction of an "underpayment" of past benefits even though they failed to appeal the decision which resulted in the alleged underpayment within the time period allowed for filing an administrative appeal.

(Appendix C, pp. App. 14-15.)

The Colorado Court of Appeals held:

> The plaintiffs argue that federal law, specifically 42 U.S.C. § 602(a)(22), requires the prompt correction of all underpayments, regardless of when they occurred or were discovered. We disagree. That statute requires a state plan to provide that:
>
> > The state agency will promptly take all necessary steps to correct any overpayment or underpayment of aid . . .
>
> The fact of underpayment must be *established* before it can be corrected. An underpayment is defined in federal and state regulations as 'a . . . payment . . . which is less than the amount for which the [recipient] was eligible, or failure by the state to issue a . . . payment . . . to an eligible [recipient] if such payment should have been issued.' 45 C.F.R. § 233.20(a)(13)(ii); Department of Social Services

> Income Maintenance Regulation 9 Code Colo. Reg. 2503-1 § 3.000.51. If a recipient fails to appeal the agency action which created the alleged error in calculation of eligibility or benefits within the time required by law, so as to provide a hearing officer the opportunity to conduct a timely adjudication of this matter, there is no provision of law which requires that further hearings be provided.
>
> . . .
>
> Both the federal regulations, 45 C.F.R. § 205.10(a)(5)(iii), and the State regulations . . . require that a request for an administrative appeal be made no later than ninety days from the date of notice of the action in dispute.

(Appendix C, pp. App. 16-17.)

The Colorado Supreme Court affirmed the termination and denial of Obert's AFDC benefits on the grounds that Obert neglected to seek administrative review of the agency actions until well after the expiration of the 90-day appeal period. Thus, the Court held that the actions fell "squarely within the actions governed by 45 C.F.R. § 205.10 (1987) . . . "

The Colorado Supreme Court, however, distinguished between the termination and denial of AFDC benefits, on one hand, and "underpayment" of AFDC benefits on the other. The Court held that federal and state statutes and regulations mandate that Obert be "granted the right to appeal her alleged 'underpayment' regardless of the time limitations imposed by statute and regulations." The Court concluded that:

> A policy of the Colorado Department that provides for a time limit on Obert's right to seek correction of an underpayment violates state and federal law . . .

The Court identified 42 U.S.C. § 602(a)(22) (1986) and 45 C.F.R. § 233.20(a)(13) (1987) as the federal law violated by the policy of the Colorado Department of Social Services. In support of this conclusion, the Court relied on several cases involving these sections, specifically *Tambe v. Bowen*, 839 F.2d 108 (2nd Cir. 1988) and *Edwards v. McMahon*, 834 F.2d 796 (9th Cir. 1987).

REASONS TO ISSUE WRIT

Review is sought here because the Colorado Supreme Court has decided an important question of federal law which has not been, but should be, settled by this court (S. Ct. r. 17.1(c)). The issue is important to all jurisdictions because of its impact upon the administration of the AFDC program, a joint federal-state program.

The Colorado Supreme Court has ruled that a denial or a termination of AFDC benefits must be appealed within the time limits set forth in 45 C.F.R. § 205.10(a)(5)(iii) (1987). The court then distinguishes the situation where a recipient received less than the full amount of monthly AFDC benefits. This latter situation is characterized by the court as an "underpayment" for which the time limits set forth in 45 C.F.R. § 205.10(a)(5)(iii) do *not* apply. It is this conclusion that the Colorado Department of Social Services asserts is erroneous.

42 U.S.C. § 602(a)(22) (1986) and its implementing regulation, 45 C.F.R. § 233.20(a)(13)(ii) (1987), require the states to "promptly take all necessary steps to correct any overpayment or underpayment" of AFDC benefits. The

Colorado Department of Social Services agrees that it is required to correct incorrect payments of AFDC benefits. The issue here, however, is whether Obert has the right to assert that an underpayment exists after the time for her to appeal the County Department's action has lapsed. The regulations are clear that requests for hearings to determine whether or not underpayments exist must be filed within specific time frames. *See* 45 C.F.R. § 205.10(a)(5)(iii) (1987).

The effect of the decision of the Colorado Supreme Court is to render 45 C.F.R. § 205.10(a)(5)(iii) (1987) meaningless. Under the Court's decision, an award of AFDC benefits which is less than the maximum amount is appealable forevermore without restriction. Following the Colorado Supreme Court's ruling, the states would never be able to close AFDC files as their actions on those files would be appealable in perpetuity. Such a result is not mandated by Congress and is not required by the statute and regulations on "underpayments."

The Colorado Supreme Court erroneously relies on *Edwards, supra* and *Tambe, supra*. The issue in those cases was whether the Secretary of Health and Human Services ("HHS") was required to make corrective payments to *former* recipients of AFDC. The courts there held that 42 U.S.C. § 602(a)(22) (1986) required correction of underpayments to both current and former recipients. The courts held that 45 C.F.R. § 233.20(a)(13)(ii) (1987) was invalid in its attempt to limit correction of underpayments to *current* recipients.

The Circuit Courts in *Edwards, supra* and *Tambe, supra* did not address the issue presented herein, whether a state must provide the opportunity for a hearing on

county determinations of aid *after* the time to appeal such determinations has passed. The regulation regarding timeliness of appeals, 45 C.F.R. § 205.10(a)(5)(iii) (1987), was not the subject of the *Edwards, supra* and *Tambe, supra* cases nor even discussed therein. Thus, the cases are not dispositive on the merits of this case.

CONCLUSION

The issue in this case deserves analysis by this Court as it raises new questions about the relationship between 42 U.S.C. § 602(a)(4) (1986) regarding the opportunity for fair hearing and 42 U.S.C. § 602(a)(22) (1986) regarding the correction of underpayments. The issue has never been decided by this Court.

This Court is urged to correct the error made by the Colorado Supreme Court in its interpretation of the requirements on the states established by the federal Social Security Act, which governs the AFDC program, by issuing a Writ of Certiorari and either setting the matter for full briefing and argument or ordering a summary reversal of the portion of the Colorado Supreme

Court's decision which grants an unlimited right to appeal decisions regarding AFDC benefits.

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APPENDIX A

STATE OF COLORADO
DEPARTMENT OF SOCIAL SERVICES

AGENCY DECISION

IN THE MATTER OF APPEAL NO. SM 84-1025 FROM THE DECISION OF THE ARAPAHOE COUNTY DEPARTMENT OF SOCIAL SERVICES DENYING MEDICAL ASSISTANCE (MEDICAID) TO MRS. KIM A. OBERT.

The above-captioned matter was heard before Thomas R. Moeller, Hearing Officer, State Department of Administration, in the offices of the Arapahoe County Department of Social Services, in Littleton, Colorado, on January 8, 1985, at 10:30 a.m.

The appellant was represented by Ms. Terri J. Bailey, Paralegal, Legal Aid Society of Metro Denver. The Arapahoe County Department of Social Services was represented by Mr. Ray Frenchmore, Assistant County Attorney.

Mrs. Kim A. Obert will be referred to as "K.O."; the Arapahoe County Department of Social Services will be referred to as the "County Department"; Colorado Revised Statutes, 1973, will be referred to as "C.R.S."; Colorado Medical Assistance Program will be referred to as "Medicaid"; and the Regulations of the State Department of Social Services referred to herein are from the Staff Manual, and shall be cited by their section number, title, and effective date.

FINDINGS OF FACT

Based upon all the evidence presented at the hearing, including written submissions in support of the respective parties positions received after the hearing, this Hearing Officer enters the following findings of fact:

1. K.O. appeals termination of her AFDC and Medicaid assistance by the County Department effective January 1, 1983, or in the alternative, seeks correction of underpayments for such assistance under *Section 3.800.51 and 3.800.53 – Correction of Underpayments,* effective November 1, 1979, [See 45 CFR 233.20(a)(12), (13).]

2. On June 11, 1982, K.O., then age 23, applied for AFDC and Medicaid for the family unit of one adult and one child. Certification for AFDC was made in a monthly grant of $66 and paid from July through December, 1982. K.O. initially asserts that the AFDC grant was in error based upon the assumption that K.O. paid none of her own shelter, utilities, and food expenses. The evidence shows that K.O. paid one half of her income for room and board.

3. On December 2, 1982 the County Department sent to K.O. a PA-75 Advance Notice of Termination of AFDC. As a basis therefore, the County Department cited *Section 3.120* and stated "You are ineligible for your assistance because you have failed to provide a copy of Zachery's Social Security card." Termination was to be effective January 1, 1983. The County Department had no record in their files of the notice being returned. K.O. testified that she did not receive the PA-75 Advance Notice of Termination, however, she became aware of the termination of assistance when she received a telephone

call from the technician in January, 1983 inquiring whether she wanted continued Medicaid benefits. As a result of this conversation K.O. reapplied on February 10, 1983 for AFDC and Medicaid assistance. The application was dated February 8, 1983. K.O. contends that the technician told her that she would be eligible for Medicaid benefits. That technician, Bruce Harrison, is no longer employed with the County Department.

4. On March 17, 1983 a PA-75 Advance Notice of Denial of the February 8, 1983 application was mailed to K.O. effective April 1, 1983. The basis of the denial was: "You are not eligible for assistance because of excess resources." K.O. was hospitalized at Swedish Hospital on February 15, through February 17, 1983. She received additional medical treatment in August, and September, 1983. Although K.O. supplied the hospital with a Medicaid card she had received in January, 1983 the hospital rejected the Medicaid billing because she was no longer eligible for AFDC and Medicaid assistance effective January 1, 1983.

5. K.O., through her legal representative, asserts that the PA-75 Advance Notice of Termination of Assistance dated December 2, 1982 was defective in the following particulars: (1) the prior notice of proposed action was not adequate, *Section 3.830.44 – Prior Notice – Timely and Adequate,* effective November 1, 1979 and *Section 8.058.4 – Prior Notice,* effective May 1, 1983: (2) the notice of December 2, 1982 failed to state that Medicaid would also be terminated as provided under *Section 8.058.4 supra* and *Section 3.830.21(d) – Advance Notice of Denial, Reduction, or Termination of Assistance,* revised effective March 1, 1981. It is asserted that the notice was defective because

K.O. provided to the County Department a Form SSA-5028 Receipt for Application for Social Security number on Zachery M. Obert dated July 7, 1982 and also the required social security card for the minor child. Indeed, the County Department had a record of receipt of the social security card and the form SSA-5028 in its files. In addition, it is asserted that the PA-75 was inadequate since it failed to state the proper section under the manual regulations as a basis of the adverse action of termination of assistance. The PA-75 cited Volume III *Section 3.120 – Determination of Eligibility – Eligibility Establishment*, revised effective April 1, 1984. A review of subsection .11 states that the applicant has a primary responsibility to provide necessary information needed in establishing eligibility. The Hearing Officer finds that the County Department may reasonably rely upon *Section 3.120.11* as a basis of the adverse action of termination of assistance. Consequently, the notice PA-75 complied with the definitional requirements providing a written notice which included a statement of the action the County Department intended to take, the reasons for the intended action, the specific regulations supporting such action, an explanation of the individual's right to request a County Evidentiary Hearing or State Department hearing, and the circumstances under which assistance is continued if the hearing is requested, all in compliance with *Sections 3.830.44 and 8.058 supra.*

6. In the alternative K.O. asserts that since she provided the information necessary to determine eligibility, namely the social security card for the minor child prior to certification for AFDC and Medicaid assistance commencing with July, 1982, the error of requesting the

verification of the social security card and subsequent termination of the AFDC and Medicaid assistance was caused by the County Department. As a result of such error the recipient's money payment resulted in an underpayment in which the County Department is required to take prompt action to correct. The correction of underpayments includes Medicaid reimbursement for medical services to K.O. in February, August and September, 1983, adjustment and retroactive AFDC payments for the payment period of July through December, 1982 reflecting an increase in benefits from the monthly allotment of $66 to a monthly allotment of $252, and retroactive payments for AFDC and Medicaid reimbursement from January 1, 1983 to the present, if K.O. is otherwise qualified. See *Section 3.800.53(e) – Correction of Underpayments*, effective November 1, 1979.

7. The County Department asserts that even if there was error in terminating the assistance incorrectly because the information requested had already been received by the County Department, the recipient is not entitled to an appeal of the adverse action taken where she failed to timely appeal the notification of adverse action within the time limits prescribed under *Section 3.850.11 – Opportunity for State Hearing*, effective May 1, 1980. Under subsection (b) it requires the recipient, who elects not to avail herself of a County Evidentiary Hearing, to appeal directly to the state within 26 days from the date the prior notice of proposed action was mailed. Since the appeal letter was received on October 5, 1984 some 22 months after the PA-75 Advance Notice of Termination of Assistance was mailed, the recipient has no standing to appeal and the Hearing Officer is without jurisdiction to

entertain that appeal. It is asserted under *Section 3.800.5 supra* that there are no time constraints or limitations for underpayment corrections where the error is found to be the fault of the County Department. However, an underpayment based upon agency error can be corrected by the County Department in accordance with County Letter No. 84-349-A dated December 31, 1984 and any appeal is unnecessary. (See Appellant's Brief at page 6). Pursuant to the County Letter unless an appeal is timely filed within the 90 day time limits the Hearing Officer has no jurisdiction to review the appeal.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, this Hearing Officer makes the following Conclusions of Law:

1. It is concluded based upon the admissions made by K.O. that she had actual notice of the proposed adverse action of termination of the AFDC and the underlying Medicaid assistance in January, 1983 and that she had acknowledged that she failed to receive the monthly grant for AFDC in January, 1983, her appeal must be dismissed. She was contacted by the County Department's eligibility technician to reapply for continued assistance. Indeed, K.O. reapplied for both AFDC and Medicaid on February 8, 1983 and was interviewed by the eligibility technician on February 10, 1983. Moreover, no appeal was taken by K.O. of the adverse action of denial of the reapplication mailed to her on March 17, 1983. No reliance may be made by K.O. of any assertions made by the then eligibility technician that her eligibility for continued Medicaid would continue subsequent to the

reapplication of February 10, 1983. The eligibility technician cannot take action contrary to the eligibility sections of Colorado Department of Social Services regulations Volume III – AFDC Eligibility or Volume XIII – Medicaid Eligibility. Furthermore, K.O. was actually aware that her Medicaid eligibility was terminated since she did not receive the Medicaid card for the family unit in February, 1983.

2. Since K.O. was aware of the termination for both AFDC and Medicaid benefits in January, 1983 her right to appeal the adverse action of the termination of assistance was lost by virtue of not timely appealing within the 90 day period prescribed under *Section 3.850.11 – Opportunity for State Hearing*, effective May 1, 1980. That section provides for an extension of the time limitations by the state Hearing Officer when the individual is unable to submit a request due to "good cause". The burden of proof to show good cause is upon the recipient. However, any extension past the 26 day time limit shall not exceed 90 days in total time from the date the original prior notice of adverse action was mailed. In the instant case, it is presumed that K.O. received the prior notice of adverse action (PA-75 Form) of December 2, 1982 since it was not returned to the County Department. Moreover, where K.O. had actual knowledge of the adverse action of termination of assistance in January, 1983, failure to initiate a timely appeal within 90 days exhausted any right she may have had to an appeal, either for the termination of AFDC and Medicaid assistance or any adjustment for underpayment asserted for the certified period of July, 1982 through December, 1982. Where the appeal was not initiated until October 5, 1984 the Hearing Officer lost

jurisdiction to entertain review of the underlying dispute concerning the underpayment of assistance not only for the certified period but also after the termination of the assistance. *Section 3.850.11 supra.*

3. In addition, since K.O. was certified to receive AFDC and did receive a monthly grant of $66 commencing in July, 1982, any dispute as to the amount of the monthly grant should have been appealed within 90 days of the receipt of the initial grant in July, 1982. Failure to initiate the appeal within the 90 day time limit obviates any right K.O. had to assert an adjustment for underpayment of the assistance because of County error under *Section 3.800.51 – Corrections of Underpayments,* effective November 1, 1979. It is concluded that K.O.'s failure to pursue a timely appeal was not caused by defects in the prior notice of adverse action mailed by the County Department on December 2, 1982 and that the notice adequately complied with the requirements of *Sections 3.830.44 and 8.058(4) supra.* K.O. has not demonstrated "good cause" for an untimely submission of the appeal. Even if "good cause" did exist, the Hearing Officer was no jurisdiction to extend the time of the appeal past 90 days from notice of the adverse action.

4. This case cannot be properly characterized as a "underpayment case" or an appeal seeking correction of an underpayment. The appeal letter speaks only to the subsequent denial of Medicaid reimbursement for hospital bills incurred by K.O. at Swedish Hospital. Medicaid reimbursement is predicated on prior eligibility for the AFDC assistance. Where the AFDC assistance was terminated effective January 1, 1983 Medicaid would not be

authorized for any subsequent hospitalization and medical treatment. The Hearing Officer has no jurisdiction to review the underpayments of assistance for the certified period of July through December, 1982 or for continued AFDC and Medicaid reimbursement subsequent to January, 1983 even though "there is no time limit on payments as a result of evidentiary hearings or appeals." *Section 3.800.53 – Correction of Underpayments,* effective November 1, 1979. This regulatory clause is inapplicable where, as here, there is no jurisdiction of the underlying appeal of the underpayment of the monthly assistance where the time limits under *Section 3.850.11* would be effectively invalidated. The Hearing Officer has no jurisdiction to invalidate any of the State Department's regulations. *Section 3.850.71 – Decision and Notification,* effective July 1, 1982. *See Mary Jane Corona,* Agency Decision, Appeal No. 83-785 decided November 7, 1983. Moreover, County Letter 84-349-A cannot confer jurisdiction to the Hearing Officer in excess of the 90 day limitation on the underlying issue of underpayments contrary to the regulation. Such review is limited to the State Department of Social Services. (See the procedures in the County Letter).

AGENCY DECISION

THEREFORE it is the Decision of this Agency that the Hearing Officer does not have any jurisdiction to consider the appeal on its merits of the correction of underpayments and the termination of AFDC and Medicaid assistance to K.O. Therefore, K.O.'s appeal must be dismissed.

This Agency Decision shall be effective and binding upon K.O. and the Arapahoe County Department of

Social Services three days after the date set forth below in the Certificate of Mailing, *Section 3.850.7 – Decision and Notification*, effective May 1, 1980.

All Parties have the right to apply for judicial review of this Agency Decision by the filing of an action for review in the appropriate State District Court, pursuant to the provisions of Colorado Revised Statutes, 1973, 24-4-106(4) and 26-1-106. Any such action must be filed in accordance with the Rules of Civil Procedure for Courts of Record in Colorado within thirty days after this Agency Decision has become effective.

/s/ Thomas R. Moeller
THOMAS R. MOELLER,
Hearing Officer

DATED: At Denver, Colorado
March 12, 1985

CERTIFICATE OF MAILING

I certify that I have mailed a true and correct copy of the above AGENCY DECISION to Kim A. Obert, c/o George W. Morin, 2888 S. Wheeling Way, Aurora, Colorado 80014; and to her legal representative, Terri Bailey, Paralegal, Legal Aid Society of Metro Denver, Inc., 770 Grant St. Suite 105, Denver, Colorado 80203; and to Braidwood Robinson, Director, Arapahoe County Department of Social Services, 5335 So. Prince St., Littleton, Colorado, by depositing same in the U.S. Mail, postage prepaid at Denver, Colorado, on this 13th day of March, 1985.

/s/ Denise Del Rio
Secretary to the Hearing Officer

cc: Income Maintenance

APPENDIX B

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 85 CV 4253, Courtroom 20

ORDER

KIMBERLY A. OBERT

v.

COLORADO DEPARTMENT OF SOCIAL SERVICES

Between July and December of 1982, Plaintiff received a partial AFDC grant of $66.00. On December 2, 1982 County Social Services terminated these benefits effective January 1, 1983.

Plaintiff had the right to appeal the termination of her benefits by personal appearance on December 13, 1982 or by filing a written appeal by December 28, 1982. In addition, she had the right to appeal upon a showing of good cause within 90 days of December 2, 1982. Plaintiff failed to appeal.

Instead, she filed a new application for AFDC on February 10, 1983. Social Services denied her application. Plaintiff had the right to appeal her denial of assistance by personal appearance on March 28, 1983; or by filing a written appeal within 26 days of March 17, 1983 or, with good cause, within 90 days of March 17, 1983. Plaintiff again failed to appeal within the time limits provided.

Twenty-two months after notice of her termination she filed an appeal. An administrative hearing was held on January 8, 1985. Hearing Officer Moeller issued his opinion denying Plaintiff's requested relief on March 12, 1985.

Plaintiff seeks judicial review of the Agency Decision under C.R.S. 24-4-106. This Court reviewed the administrative record and concludes that the hearing officer neither abused his decretion nor exceeded his jurisdiction.

Without hearing evidence from the Defendant, the hearing officer found the existence of facts which support Plaintiff's position that her partial grant of $66.00 should have been a full grant and that County Social Services was factually in error in terminating her benefits and in denying her reapplication for benefits. However, the hearing officer denied her requested relief finding that he did not have jurisdiction to consider the appeal on its merits because Plaintiff had not filed timely appeals.

Plaintiff admits she failed to appeal within the time limits of 9 C.C.R. 2503.1 section 3.850.11(b), but argues that 45 C.F.R. 233.20(a)(13) requires that the county department promptly correct the underpayments made to her despite her failures to appeal. The Plaintiff insists that any underpayment of benefits must be corrected no matter the circumstances in which underpayment occurs.

Limitation of rights within reasonable time frames is not inconsistant with any federal or state statutes or federal or state regulations. On the other hand, the time limits here are completely consistant with the right to a fair agency hearing under U.S.C. section 602(a)(5), 45 C.F.R. section 205.10 and 9 C.C.R. 2503-1 section 3.850.11.

Under these provisions, Plaintiff enjoyed the right, within reasonable time limits, to seek a fair review of her claims. If she had exercised her right of review in a timely fashion, the hearing officer would then have had the opportunity to take evidence from both sides and potentially to make *factual and legal* determinations consistent with her claims. She did not, however, exercise her rights of review within the time allowed. Consequently, the agency determinations became final and legally binding.

While there may well be *facts* which support her claim of underpayment, the agency determinations are *legally* final and may not now be disturbed. The hearing officer agreed on the basis of the *facts* before him that Plaintiff may well have been underpaid but was without jurisdiction to make the *legal* determination of underpayment because of her failures to appeal in a timely fashion.

The Agency Decision is affirmed.

Dated this 12 day of November, 1985.

BY THE COURT:

/s/ Paul A. Markson Jr.
PAUL A. MARKSON, JR.

cc: all counsel

APPENDIX C

COLORADO COURT OF APPEALS

No. 85CA1777
No. 85CA1781

CHERONNE BROWN and KIMBERLY A. OBERT,

Plaintiffs-Appellants,

v.

COLORADO DEPARTMENT OF SOCIAL SERVICES,

Defendant-Appellee.

Appeal from the District Court of the City and County of Denver

Honorable Paul A. Markson, Jr., Judge

DIVISION II JUDGMENTS AFFIRMED
Opinion by JUDGE STERNBERG (Filed July 16, 1987)
Smith and Babcock, JJ., concur

Bernard A. Poskus
Denver, Colorado

Attorney for Plaintiffs-Appellants

Duane Woodard, Attorney General
Charles B. Howe, Chief Deputy Attorney General
Richard H. Forman, Solicitor General
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Attorneys for Defendant-Appellee

In this consolidated appeal of two rulings by the district court, the issue presented is whether recipients of Aid to Families with Dependent Children (AFDC) benefits can seek correction of an "underpayment" of past

benefits even though they failed to appeal the decision which resulted in the alleged underpayment within the time period allowed for filing an administrative appeal. We hold that they cannot.

AFDC is a combined federal and state program of financial assistance to dependent and needy children and their parents or relatives who care for them. *See* Title IV-A of the Social Security Act, 42 U.S.C. §601, et seq. (1982). States that elect to participate in the program must develop a plan which complies with the requirements set forth in 42 U.S.C. §602(a) (1982) and regulations promulgated by the U.S. Department of Health & Human Services (HHS). The State of Colorado has elected to participate in the AFDC program by passage of the Colorado Public Assistance Act, §26-2-101, et seq., C.R.S. (1982 Repl. Vol. 11), establishment of the State Department of Social Services (Department), and adoption of regulations implementing the program. Department of Social Services Income Maintenance Regulations, 9 Code Colo. Reg. 2503-1. Colorado's plan has been approved by HHS pursuant to 42 U.S.C. §602(b).

Plaintiff Brown received a notice from the Department informing her that an inheritance she received was being construed as income and that her benefits were being reduced as a result. She subsequently received notice that the Department was initiating an overpayment recovery action that would reduce her benefits by $25 per month for two years.

Plaintiff Obert's benefits were terminated for failure to provide the Department with a copy of her son's social security card. Obert also was later notified that her re-

application for benefits was denied because she had excess income.

These Department decisions are the bases of plaintiffs' claims of underpayment of benefits. Each notice informed the plaintiff of the Department's decision and also advised her that she could appeal the decision by appearing at an evidentiary hearing on a date, time, and location specified in the notice, or by filing a written appeal with the State within the prescribed time period. Neither plaintiff appeared at the hearing or filed a written appeal within the time limitation. Instead, each waited over one and one-half years after receiving notice of the decisions before seeking review.

Both plaintiffs were given a hearing on their request, but in both cases the hearing officer found that the failure to appeal the Department's initial decision leading to the claimed underpayment within the time limits allowed by law barred the plaintiff from later requesting a corrected payment. In both cases, the district court affirmed the hearing officer's decision.

The plaintiffs argue that federal law, specifically 42 U.S.C. §602(a)(22), requires the prompt correction of all underpayments, regardless of when they occurred or were discovered. We disagree. That statute requires a state plan to provide that:

> "The state agency will promptly take all necessary steps to correct any overpayment or underpayment of aid. . . ."

The fact of underpayment must be *established* before it can be corrected. An underpayment is defined in federal and state regulations as "a . . . payment . . . which is

less than the amount for which the [recipient] was eligible, or failure by the state to issue a . . . payment . . . to an eligible [recipient] if such payment should have been issued." 45 C.F.R. §233.20(a)(13)(ii); Department of Social Services Income Maintenance Regulation 9 Code Colo. Reg. 2503-1 §3.000.51. If a recipient fails to appeal the agency action which created the alleged error in calculation of eligibility or benefits within the time required by law, so as to provide a hearing officer the opportunity to conduct a timely adjudication of the matter, there is no provision of law which requires that further hearings be provided.

Federal regulations require the States to provide an opportunity for a hearing to any recipient of public assistance who is aggrieved by any *agency action* resulting in suspension, reduction, discontinuance, or termination of benefits. 45 C.F.R. §205.10(a)(5) (emphasis added). Both the federal regulations, 45 C.F.R. §205.10(a)(5)(iii), and the State regulations, Department of Social Services Income Maintenance Regulations 9 Code Colo. Reg. 2503-1, §3.850.11, require that a request for an administrative appeal be made no later than ninety days from the date of notice of the action in dispute.

Both plaintiffs had the opportunity to appeal the Department decisions affecting them and thereby establish that an underpayment existed. They both chose not to appeal within ninety days, and cannot avoid their failure to appeal by asserting an independent claim of underpayment after the limitations period for appeal has run.

The district court judgments are affirmed.

JUDGE SMITH and JUDGE BABCOCK concur.

APPENDIX D

SUPREME COURT, STATE OF COLORADO
No. 87SC342 December 19, 1988

KIMBERLY A. OBERT, Petitioner,
v.
THE COLORADO DEPARTMENT OF SOCIAL SERVICES, Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC JUDGMENT AFFIRMED IN PART, REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

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Charles B. Howe, Deputy Attorney General
Richard H. Forman, Solicitor General
Wade Livingston, First Assistant Attorney General
Vivianne Chaumont Oates, Assistant Attorney General
Denver, Colorado

Attorneys for Respondent

JUSTICE ERICKSON delivered the Opinion of the Court.

We granted certiorari to review *Brown v. Department of Social Services*, 746 P.2d 1379 (Colo. App. 1987).[1] The

[1] The court of appeals consolidated the judgments of the district court in two cases raising identical issues, *Brown v.*

(Continued on following page)

issue before us is whether the recipient of Aid to Families with Dependent Children (AFDC) benefits can seek to correct an "underpayment" of past benefits after the time has expired for filing an administrative appeal. The court of appeals concluded that the failure of petitioner to perfect a timely appeal of the declaration of benefits precluded review on appeal. However, correction of an underpayment may be made administratively beyond the time permitted for appellate review. Accordingly, we remand to the court of appeals with directions to return the case to the district court for remand to the state hearing officer for determination of whether there was an "underpayment" and for further proceedings consistent with County Letter 84-349-A and 9 Code Colo. Reg. 2503-1, § 3.800.5 (1988) (Correction of Underpayments).

I.

AFDC is a cooperative federal and state program of financial assistance to needy children and their families. *See* Title IV-A of the Social Security Act, 42 U.S.C. §§ 601 to 616 (1983 & Supp. 1988). *See generally Shea v. Vialpando*, 416 U.S. 251, 253 (1974). The federal program reimburses each participating state for a percentage of the funds it expends. 42 U.S.C. § 602 (1983 & Supp. 1988). In return, states that elect to participate in the program must administer their assistance programs pursuant to state

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Department of Social Services, No. 85CA1781, and *Obert v. Department of Social Services*, No. 85CA1777, and published its opinion under the caption *"Brown v. Department of Social Services."* Brown did not petition for certiorari, but Obert did.

plans that conform to applicable federal statutes and regulations. The federal regulations are promulgated by the United States Department of Health and Human Services (HHS). *Id.; see also Lukhard v. Reed*, 107 S. Ct. 1807, 1810 (1987); *Heckler v. Turner*, 470 U.S. 184, 189 (1985). Colorado has elected to participate in the AFDC program by enacting sections 26-2-101 to -132, 11 C.R.S. (1982 & 1988 Supp.). The Colorado Department of Social Services (Colorado Department) has promulgated regulations implementing the program. *See* 9 Code Colo. Reg. 2503-1, §§ 3.600 to 3.685 (1988). The Colorado Department oversees and administers the program, with the assistance of the county departments of social services (County Department). *See* §§ 26-2-104 to -108, 11 C.R.S. (1982 & 1988 Supp.).

The petitioner, Kimberly A. Obert, and her son, began receiving AFDC benefits in July 1982.[2] On December 2, 1982, the County Department sent Obert an "Advance Notice of Denial, Reduction or Termination of Assistance" form letter that advised Obert of the termination of her benefits, effective January 1, 1983. The letter stated that "[y]ou [Obert] are ineligible for assistance because you have failed to provide a copy of [your son's] Social Security card." The notice also informed Obert of her right to a hearing to contest the County Department's

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[2] The total award to Obert in July 1982 was seventy-four percent less than it would have been if the County Department had not determined that Obert's father provided her with living quarters and food. Obert claims that she was making payments to her father when she could for room and board and therefore the initial award was erroneous and an "underpayment."

decision, and reserved a specific time and place for the hearing.[3] Obert failed to appear at the hearing on December 13, 1982.

Instead of exercising her rights to administrative review, Obert reapplied for AFDC benefits in February 1983. She again admitted that her father provided her with food and shelter. On March 17, 1983, the County Department mailed Obert another "Advance Notice of

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[3] The notice sent to Obert was a standard form used by the County Department to inform applicants and recipients of the denial, reduction, termination or recovery of AFDC benefits. Following an explanation of the reasons for the County Department's action, the notice provision of the form states, in part:

> II. You have the right to a hearing before the county department to contest this decision. The hearing has been set on the date shown below in section III. You may be able to get a one-day extension of this scheduled hearing date by calling your technician. Your call or written request for extension, questions, request for further information, or other communication with your technician about this proposed action must be received two days before the proposed effective action date listed in section I-B.
>
> If you disagree with the above-described proposed action and want to appeal, i.e. have a county hearing, you must (1) call your eligibility technician to say that you want to have such a hearing, and (2) you must come to the place described in section III below on the date and at the time shown. If you do not call or if you ask for but do not come to the county hearing on the date and time shown or the next day if an extension is granted, you will be considered as having abandoned the county-level appeal and the proposed action will be taken by the county department. You may request and have your county hearing before the effective date shown in section I above.

Denial, Reduction or Termination of Assistance" and advised Obert that she was not eligible for assistance because of "excess resources."[4] The form letter again set out Obert's right to review and designated a hearing date of March 28, 1983.[5] Obert failed to appear at the county hearing.

Obert filed a request for a hearing before the Colorado Department approximately twenty-two months after the termination of her benefits in December 1982. She asserted three claims: (1) the amount of the AFDC benefits and payments she received between July and December 1982 was less than the amount to which she was entitled; (2) that she was wrongfully terminated from AFDC benefits in December 1982 for failure to furnish her son's social security card; and (3) that she was wrongfully denied AFDC benefits when she reapplied in March 1983 because the County Department erroneously determined that she was ineligible for aid. A hearing was

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[4] The two primary elements in determining a family's need for financial assistance are the resources available to the "assistance unit" [family] and the income available to the "assistance unit." *See* Colorado Department of Social Services Staff Manual Volume 3, Income Maintenance § 3.660.1, codified at 9 Code Colo. Reg. 2503-1, § 3.660.1 (1988).

[5] At the hearing in January 1985, Obert testified that she was unaware of the termination of her AFDC benefits because she did not receive the first notice. She stated that she discovered the termination only when a technician telephoned her in January 1983, to inquire about her Medicaid benefits. However, Obert did not dispute receiving the second notice denying her reapplication for benefits. The issue of whether or not Obert received adequate notice of the termination of her AFDC benefits is not before us.

conducted before the state hearing officer on January 8, 1985. The hearing officer held that based on Obert's own admissions, Obert had actual notice of both the termination of her AFDC benefits and the denial of her reapplication for assistance. The officer concluded that Obert's right to appeal was foreclosed by her failure to appeal the adverse action within the ninety-day limitation pursuant to 9 Code Colo. Reg. 2503-1, § 3.850.11 (1981).[6]

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[6] Section 3.850.11 provides:

> An applicant for or a recipient of assistance payments who is dissatisfied with a county department action or the results of the county evidentiary hearing . . . or failure to act concerning benefits may appeal to the State Department for a fair hearing before an independent State Hearing Officer. This will be a full evidentiary hearing of all relevant and pertinent facts to review the decision of the county department. The time limitations for submitting such an appeal are:
>
> a. when the individual elects to avail himself of a county evidentiary hearing but is dissatisfied with that decision, the appeal must be submitted in writing (mailed[)] within 15 days of the date the county evidentiary hearing decision was mailed;
>
> b. when the individual elects not to avail himself of a county evidentiary hearing but wishes to appeal directly to the State, a written request therefor must be submitted (mailed) not later than 26 days from the date prior notice of the proposed action was mailed to the person;
>
> c. appeals must be mailed to the Office of Appeals, Colorado Department of Social Services.

(Continued on following page)

The hearing officer held that he did not have jurisdiction to consider the appeal on its merits and could not correct the underpayments and termination of AFDC and Medicaid assistance to Obert, and dismissed Obert's appeal.

Obert sought judicial review of the hearing officer's decision in the district court pursuant to section 24-4-106, 10A C.R.S. (1988). The district court found that there may be facts in the administrative record which support Obert's claims, but concluded that the hearing officer correctly held that he lacked jurisdiction to rule on the merits of Obert's appeal. Accordingly, the district court entered an order affirming the decision of the hearing officer. The court of appeals concluded that the "fact of

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> An extension to the time limitations provided above may be granted by the State Hearing Officer when the individual is unable to submit a request due to "good cause"; i.e., specifically, a sudden severe illness, an accident, or other particular occurrence, which, by its emergent nature and drastic effect, prevented such appeal submission within the time periods prescribed. The burden of proof to show "good cause" shall be upon the recipient or applicant. *Such extensions shall not exceed 90 days in total time from the date of original prior notice of the action under appeal.* The Hearing Officer shall enter the reason justifying extension in the appeal record and decision.

(Emphasis added.)

Accordingly, by the Colorado Department's regulations, a request for an administrative appeal must be made no later than ninety days from the date of notice of the contested action.

underpayment must be *established* before it can be corrected" and held that no provision of law requires further hearings when a recipient fails to appeal an erroneous agency action within the time mandated by law. *Brown*, 746 P.2d 1379, 1381. Since Obert had an opportunity to appeal within ninety days, and failed to appeal, she lost her right to further appellate review. *Brown*, 746 P.2d 1379, 1381; *see* 45 C.F.R. § 205.10(a)(5)(iii) (1987); 9 Code Colo. Reg. 2503-1, § 3.850.11 (1981). She could not appeal by merely asserting a claim of underpayment of benefits after the ninety-day period expired. *Brown*, 746 P.2d 1379, 1381. We conclude that since Obert's first claim was for underpayment of AFDC benefits the error could be corrected administratively in accordance with County Letter 84-349-A and 9 Code Colo. Reg. 2503-1, § 3.800.5 (1988) (Correction of Underpayments).[7] Section 3.800.5 – Correction of Underpayments – provides in pertinent part:

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[7] County Letter 84-349-A issued by the Colorado Department to the county departments states in pertinent part:

> "Current policy as outlined in Sections 3.800.5 through 3.800.54 requires prompt action to correct an underpayment error. Section 3.800.53 specifies time frames for State reimbursement of retroactive payments and states there is no time limit for a retroactive payment if the payment is authorized as a result of an evidentiary hearing or appeal.
>
> *The rules require prompt correction of an underpayment regardless of when the discovery of the error occurs.* The State Department of Social Services assigns an appeal number to authorize reimbursement of retroactive payments which exceed 90 day or 12 month limitations."

(Emphasis added.)

> The county department must take prompt action to correct underpayments to current recipients and those who would be current recipients if the error causing the underpayment had not occurred. Underpayment means a financial assistance payment(s) received by or for an assistance unit which is less than the amount for which the assistance unit was eligible, or failure to issue a financial assistance payment to an eligible assistance unit if such payment should have been issued. When the possibility of an underpayment is discovered or brought to the attention of the county department, the income maintenance staff must:
>
> a. record the date of the discovery;
>
> b. investigate and verify the facts;
>
> c. determine whether an underpayment has occurred.
>
> When it is determined that an underpayment has occurred, the county department must take action to correct the payment. The two principal means of correction are
>
> a. issue an additional warrant so that the payment and the authorization are in agreement;
>
> b. issue a retroactive payment warrant when the authorization is incorrect.

(Emphasis added.)

II.

Obert claims that the broad statutory language authorizing AFDC, the federal regulations interpreting the statute, and the federal statute's legislative history all compel the conclusion that AFDC recipients or applicants

may seek review of the Colorado Department's mistaken termination or denial of AFDC benefits at any time. We disagree.

The federal AFDC statutes require that the state plan must provide an opportunity for a fair hearing before the administering agency to any individual whose claim for AFDC is denied or not acted upon with reasonable promptness. 42 U.S.C. § 602(a)(4) (Supp. 1988). Section 26-2-127, 11 C.R.S. (1982 & 1988 Supp.), parallels 42 U.S.C. § 602(a)(4) and grants an applicant or recipient the opportunity to appeal the Colorado Department's or County Department's decision to deny, suspend, terminate, or modify an AFDC award.

The HHS regulation addressing the fair hearing requirement states:

> (a) *State plan requirements.* A state plan under title . . . IV-A . . . shall provide for a system of hearings under which:
>
> (5) An opportunity for a hearing shall be granted to any applicant who requests a hearing because his or her claim for financial assistance . . . is denied or is not acted upon with reasonable promptness, and to any recipient who is aggrieved by any agency action resulting in . . . suspension, reduction, discontinuance, or termination of assistance . . . [and]
>
> (iii) The claimant shall be provided reasonable time, *not to exceed 90 days, in which to appeal an agency action.*

45 C.F.R. § 205.10 (1987) (emphasis added). The Colorado Department's regulations also require an aggrieved applicant or recipient to appeal an adverse action within ninety days. *See* 9 Code Colo. Reg. 2503-1, § 3.850.11 (1981).

The Colorado Department's time limits for the right to appeal an adverse AFDC decision conform to the federal statutes and regulations.[8] *See* 42 U.S.C. § 602; *Lukhard*, 107 S. Ct. at 1810; *Heckler*, 470 U.S. at 189. An aggrieved applicant or recipient loses the right to appeal the denial, suspension, termination, or modification of AFDC benefits if notice of intent to appeal is not given within ninety days.

Here, Obert's AFDC benefits were terminated because of her failure to provide a copy of her son's social security card. Her reapplication for benefits was denied by the County Department because she was supported by her father. It is undisputed that Obert neglected to seek administrative review of the agency actions until well after the expiration of the ninety-day appeal period and nearly two years after the denial of her reapplication. The County Department's termination of Obert's benefits and the denial of her reapplication fall squarely within the actions governed by 45 C.F.R. § 205.10 (1987) and 9 Code Colo. Reg. 2503-1, § 3.850.11

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[8] The federal and state AFDC legislative and regulatory requirements are to be construed together. Section 26-2-105, 11 C.R.S. (1982), states:

> *Federal Requirements.* Nothing in this article shall be construed to prevent the state department from complying with federal requirements for public assistance programs expressly provided by law in order for the state of Colorado to qualify for federal funds under the social security act and to maintain said programs within the limits of available appropriations.

(1981). The hearing officer properly concluded that he had no jurisdiction to consider the merits of Obert's appeal.

III.

Obert argues that the federal and state statutes and regulations requiring correction of underpayment or overpayment of AFDC benefits mandate that she be granted the right to appeal her alleged "underpayment" regardless of the time limitations imposed by statute and regulations. Her argument challenges the County Department's initial award which was reduced seventy-four percent because her father provided her with room and board and focuses on 42 U.S.C. § 602(a)(22) (Supp. 1988), which states in pertinent part: "A State plan . . . must . . . provide that the State agency will promptly take all necessary steps to correct any overpayment or underpayment of aid under the State plan."

The HHS regulations similarly require that a state plan must provide for specific uniform state policies for prompt correction of underpayments. 45 C.F.R. 233.20(a)(13)(ii) (1987). The Colorado Department also allows for the prompt correction of underpayments in a similar regulation. 9 Code Colo. Reg. 2503-1, § 3.800.51 (1988). We agree with Obert's claim that neither the state nor federal regulations set forth a time limitation for the state to rectify underpayments.

Several courts have interpreted 42 U.S.C. § 602(a)(22) and 45 C.F.R. 233.20(a)(13) broadly to permit recovery of underpaid benefits long after the error was committed and discovered. *Tambe v. Bowan,* 839 F.2d 108 (2d Cir.

1988), held that the intent of Congress was to permit completely unrestrictive and unlimited corrections of underpayments regardless of when they were discovered. *Id.* at 110. The court held that the intent of 42 U.S.C. § 602(a)(22) is to require agencies to make corrective payments regardless of a later change in the recipient's eligibility for aid. *Tambe*, 839 F.2d at 111. Similarly, *Edwards v. McMahon*, 834 F.2d 796 (9th Cir. 1987), examined the plain language of 42 U.S.C. § 602(a)(22) to discern Congressional intent and stated:

> Section 602(a)(22) requires state agencies to "promptly take *all* necessary steps to correct *any* overpayment or underpayment of aid. . . ." (Emphasis added). "All" means every. "Any" means without restriction or limitation. The plain meaning of the statute could not be broader. Congress intended all underpayments to be corrected. *Edwards*, 834 F.2d 796, 799.

The statute was given a broad interpretation in *Cudal v. Sunn*, 742 P.2d 352 (Haw. 1987), a case with facts somewhat similar to those in this case. Cudal and her daughter, who had been receiving AFDC payments and food stamps as a separate household, moved in with Cudal's parents. Cudal immediately notified the state department of her changed housing status but the department did not adjust her payments until four months later. The court held that "Congress set no time limit for recovery or adjustment of overpayments and underpayments" and concluded that despite the department's oversight, the department could reduce Cudal's AFDC benefits to correct the overpayment. Since the right to correct an overpayment is identical to the right to correct an underpayment pursuant to 42 U.S.C. § 602(a)(22), the cases

which have addressed the time for correction of both underpayments and overpayments have declared that there is no time limitation. *Edwards; Ehrenstertfor v. Division of Pub. Welfare,* 196 N.J. Super. 405, 483 A.2d 212 (N.J. Super. Ct. App. Div. 1984); *Burton v. Department of Social Servs.,* 103 Wis. 2d 670, 309 N.W.2d 388 (Wis. Ct. App. 1981). An underpayment of benefits must be corrected regardless of when the underpayment was discovered and brought to the attention of the County Department. To comply with the broad Congressional mandate for the correction of underpayments and overpayments the Colorado Department has issued County Letter 84-349-A and 9 Code Colo. Reg. 2503-1, § 3.800.5 (1988). The County Letter provides an internal procedure for the correction of an underpayment regardless of when the discovery of the error occurs.

However, the County Letter is inconsistent, stating first that an underpayment must be corrected promptly regardless of when the underpayment is discovered, and then stating that '[i]f the time limit for a hearing has not expired up to (90 days from the mailing date of the prior notice for the payment in question), the client may request a hearing so that a decision regarding the alleged underpayment may be made.' A policy of the Colorado Department that provides for a time limit on Obert's right to seek correction of an underpayment violates state and federal law, and contradicts the holding of this case. *See* 42 U.S.C. § 602(a)(22); 45 C.F.R. 233.20(a) (13); *Edwards; Cudal; Ehrenstertfor; Burton.* Consistent with our holding, any provision of County Letter 84-349-A that deprives the state hearing officer of jurisdiction to rehear

Obert's claim for an alleged underpayment of benefits is void and without legal effect.

Accordingly, we affirm the court of appeals on the right to appellate review regarding the termination and denial of Obert's benefits, and remand to the court of appeals with directions to return the case to the district court for return to the state hearing officer for determination of whether there was an underpayment of benefits and, if so, for correction of any underpayment in accordance with County Letter 84-349-A and 9 Code Colo. Reg. 2503-1, § 3.800.5 (1988) (Correction of Underpayments).

APPENDIX E

SUPREME COURT, STATE OF COLORADO
CASE NO. 87SC342
CERTIORARI TO THE COLORADO COURT OF APPEALS, #85CA1777
DISTRICT COURT, DENVER COUNTY, #85CV4253

ORDER OF COURT

KIMBERLY A. OBERT,

Petitioner,

vs.

THE COLORADO DEPARTMENT OF SOCIAL SERVICES,

Respondent.

(Filed Jan. 17, 1989)

Upon consideration of the Petitions for Rehearing filed by the Petitioner and the Respondent in the above cause, and now being sufficiently advised in the premises,

IT IS THIS DAY ORDERED that Opinion is modified and, as modified, said Petitions for Rehearing shall be, and the same hereby are, DENIED.

BY THE COURT, EN BANC, JANUARY 17, 1989.

Honorable Paul A. Markson, Jr.
Denver District Court
City & County Building
Denver, Colorado 80202

[Seal]

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Clerk of Denver District Court
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Denver, Colorado 80202

No. 88-1686

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE COLORADO DEPARTMENT OF
SOCIAL SERVICES,

Petitioner,

v.

KIMBERLY A. OBERT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF COLORADO

RESPONDENT'S BRIEF IN OPPOSITION

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ISSUE PRESENTED FOR REVIEW

Whether the Colorado Supreme Court correctly held that 42 U.S.C. §602(a)(22) requires Petitioner to consider the merits of Respondent's claim that she was underpaid AFDC benefits between July and December 1982 without regard to any time limitation imposed by 45 C.F.R. §205.10(a)(5)(iii).

TABLE OF CONTENTS

Page

STATUTORY AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS WHY THE PETITION SHOULD BE DENIED 3

I. There is no important question of federal law raised by this petition. 3

II. Independent adequate state law grounds support the judgment of the Colorado Supreme Court. . 6

III. Only factual findings are involved in this case; the issue is not important enough to warrant review. 8

CONCLUSION 9

APPENDIX 1a

Table of Authorities

Cases:

Burton v. Department of Health, etc., 309 N.W. 2d 388 (Wis. Ct. App. 1981) 5

Cudal v. Sunn, 742 P.2d 352 (Hawaii 1987) 5

Edwards v. McMahon, 834 F.2d 796, 799 (9th Cir. 1987) . . 4

Ehrenstorfer v. Division of Public Welfare; 483 A.2d 212 (N.J. Super. Ct. App. Div. 1984) 5

Goldberg v. Kelly, 397 U.S. 254 (1970); 45 C.F.R. §205.10(a)(4)(i) 8

Tambe v. Bowen, 839 F.2d 108 (2d Cir. 1988) 4

U.S. v. Utah Construction and Mining Company, 384 U.S. 394 (1986) 5

Statutes and Regulations:

42 U.S.C. §602(a)(22) 2, 3, 4, 5

42 U.S.C. §603(a)(3) 7

45 C.F.R. §205.10(a)(5)(iii) 2, 3, 4

C.R.S. §26-1-106 (1988) 7

C.R.S. §26-2-127(1)(a)(II) (1988) 7

C.R.S. §26-2-127(1)(c)(1982) 7

C.R.S. §26-2-127(2) (1982) 7

9 Code Colo. Reg. 2503-1, §3.800.5 (1988) 1, 3, 6

9 Code Colo. Reg. 2503-1, §3.850.11 (1981) 2, 3

Miscellaneous:

County Letter 84-349-A 1, 3, 4, 6, 7

Restatement (Second) of Judgments, §83, Comment (b) (1982) 5

S. Rep. No. 139, 97th Cong., 1st. Sess., Vol. III, 519 . . 5

No. 88-1686

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE COLORADO DEPARTMENT OF
SOCIAL SERVICES,

Petitioner,

v.

KIMBERLY A. OBERT,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF COLORADO

RESPONDENT'S BRIEF IN OPPOSITION

STATUTORY AND REGULATORY PROVISIONS INVOLVED

County Letter 84-349-A is set forth in Appendix 1 at 1a, and 9 Code Colo. Reg. 2503-1, §3.800.5 (1988) is set forth in Appendix 2 at 3a. These regulatory provisions are also involved in this case.

STATEMENT OF THE CASE

This case is a judicial review of a decision of the Colorado Department of Social Services (CDSS) in an individual case concerning benefits under the Aid to Families with Dependent Children (AFDC) program. On October 5, 1984, Respondent Kimberly A. Obert filed a request for hearing asserting three claims: (1) she received less than the amount due her for the period between July and December 1982;

(2) she was wrongfully terminated from benefits in December 1982 for failure to furnish her son's social security number; and (3) she was wrongfully denied benefits on reapplication in March 1983. (Petitioner's Appendix 23).

CDSS determined that all three claims were untimely and dismissed the request for hearing. (Pet. App. 9). Obert sought state court judicial review, and the state district court affirmed the agency decision (Pet. App. 13). The Colorado Court of Appeals affirmed the judgment of the district court. (Pet. App. 18). The Colorado Supreme Court then granted certiorari on the question of whether Obert lost the right to seek correction of her alleged underpayments under 42 U.S.C. §602(a)(22) by failing to seek review of the administrative decisions creating the underpayments within the time period prescribed by state and federal regulations.[1]

The Colorado Supreme Court affirmed the judgment of the Colorado Court of Appeals in part, reversed in part, and remanded the case to CDSS for further administrative proceedings.[2] In part, the Colorado Supreme Court held that Obert could not establish an erroneous denial or termination of benefits because she failed to request an administrative hearing within ninety days of the adverse action, as required under the administrative appeal time regulations. (Pet. App. 26). Obert's second and third claims were accordingly dismissed.

On Obert's first claim, however, the Colorado Supreme Court held that 42 U.S.C. §602(a)(22) required CDSS to hear Obert's claim on the merits without regard to any

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1. Administrative appeal of an adverse agency action must be made within ninety days pursuant to 45 C.F.R. §205.10(a)(5)(iii) and 9 Code Colo. Reg. 2503-1, §3.850.11 (1981).

2. A new hearing before the CDSS is pending.

administrative appeal time regulations. (Pet. App. 32). While this case was pending, CDSS established administrative procedures for correction of underpayments, in accordance with 42 U.S.C. §602(a)(22). (Id.). The court, therefore, remanded Obert's claim to CDSS for a new hearing consistent with those administrative procedures and federal law.[3]

REASONS WHY THE PETITION SHOULD BE DENIED

I. There is no important question of federal law raised by this petition.

Petitioner asserts only two arguments why this petition should be granted. It argues that the opinion below effectively nullifies 45 C.F.R. §205.10(a)(5)(iii). (Pet. 8). CDSS also argues that no federal court has issued a dispositive decision on this issue. (Pet. 9). Neither argument presents an important question of federal law.

The Colorado Supreme Court did not invalidate 45 C.F.R. §205.10(a)(5)(iii). Rather, the court interpreted this regulation in light of the subsequent enactment of the underpayment/overpayment statute, 42 U.S.C. §602(a)(22). The court held that 45 C.F.R. §205.10(a)(5)(iii) barred any attempt to claim an underpayment of benefits in an untimely appeal of a formal denial or termination of benefits. However, in the case of an erroneous reduction in the amount

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[3]. Following the filing of petitions for rehearing by both parties, the court modified its opinion and invalidated language in the administrative procedures which placed a time limitation on the administrative correction of underpayments in cases where CDSS did not agree there was an underpayment and the recipient requested a hearing. The modified opinion is at Petitioner's Appendix D. The administrative procedures are found at Respondent's Appendix 1 and 2. They are County Letter 84-349-A and 9 Code Colo. Reg. 2503-1, §3.800.5 (1988) respectively.

of benefits, the court correctly held that Congress intended all errors to be corrected without limitation as to time. Thus, the court harmonized 45 C.F.R. §205.10(a)(5)(iii) with 42 U.S.C. §602(a)(22). This judicial construction does not raise a substantial federal question.

Assuming arguendo that there is a conflict between the decision of the Colorado Supreme Court and the federal regulation, petitioner has not demonstrated that 42 U.S.C. §602(a)(22) has been violated on the issue it requests this Court to review. The overpayment/underpayment statute requires the states to specify statewide policies for the prompt correction of any underpayments. The plain meaning of the statute is clear.

> 'All' means every. 'Any' means without restriction or limitation. The plain meaning of the statute could not be broader. Congress intended all underpayments to be corrected.

Edwards v. McMahon, 834 F.2d 796, 799 (9th Cir. 1987).

The Colorado Supreme Court correctly found that CDSS did adopt a statewide policy for the correction of underpayments in County Letter 84-349-A, pursuant to 42 U.S.C. §602(a)(22), but it properly decided the policy was too narrowly drawn and inconsistent with state law. (Pet. App. 32). (See, discussion, infra, at 6.) That interpretation is reasonable and consistent with federal law. Petitioner has not demonstrated that the Colorado Supreme Court's interpretation of CDSS procedures for the correction of underpayments is unacceptable to the Secretary of Health and Human Services or violates any provision of the Social Security Act.

No federal or state court has placed any time limitation on the states' obligations to correct underpayments. See Tambe v. Bowen, 839 F.2d 108 (2d Cir. 1988) (former

recipients of AFDC benefits may seek correction of underpayments at any time); Cudal v. Sunn, 742 P.2d 352 (Hawaii 1987) (overpayments and underpayments treated alike; neither have a time limit for recovery or adjustment); Ehrenstorfer v. Division of Public Welfare; 483 A.2d 212 (N.J. Super. Ct. App. Div. 1984) (Department must correct erroneous payment based on change in legal interpretation retroactive to date incorrect action was taken); Burton v. Department of Health, etc., 309 N.W. 2d 388 (Wis. Ct. App. 1981) (corrective payments required retroactive to date of incorrect action where error established at hearing).

Although the CDSS bemoans that it will never be able to close AFDC files, it presents no data to demonstrate how it will be harmed by the Colorado Supreme Court's interpretation of the overpayment/underpayment statute. Surely any such harm is overstated since Congress has found that 90% of all cases are correctly decided.[4] Moreover, in many other cases an administrative hearing decision would have a res judicata effect on any subsequent effort to correct an underpayment.[5] Still others would be barred by the Colorado Supreme Court's ruling strictly applying appeal time limitations in denial/termination cases. Of those remaining recipients with underpayments, it does not appear to be an odious requirement for CDSS to correct them. In fact, CDSS has admitted it is

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4. The legislative history to 42 U.S.C. §602(a)(22) shows that Congress wished to reduce the high error rate of 10% in AFDC cases. S. Rep. No. 139, 97th Cong. 1st Sess., Vol. III, 519, reprinted in 1981, U.S. Code Cong. and Ad. News, 396, 786. Since most errors are overpayments, the statute was intended to actually save money. However, to be fair Congress thought it wise to treat overpayments and underpayments alike. Id.

5. The principle of res judicata applies to administrative hearings that have the procedural characteristics of a judicial action. U.S. v. Utah Construction and Mining Company, 384 U.S. 394, 422 (1986); Restatement (Second) of Judgments, §83, Comment (b)(1982).

under an obligation to correct an underpayment when it admits an error has been made (Respondent's Appendix 1). Given the clear legal requirements of the federal statute and the factual context in which they were raised, petitioner's concerns regarding the perpetuity of appeals are not a persuasive argument.

Since petitioner has not demonstrated that the decision of the Colorado Supreme Court is contrary to any federal statute or court ruling and no important issue of federal law is present, the petition should be denied.

II. Independent adequate state law grounds support the judgment of the Colorado Supreme Court.

Obert's first claim for underpayment of benefits would have been administratively corrected by CDSS if it had agreed that an error had been made. Petitioner's policy states, "The rules require prompt correction of an underpayment regardless of when the discovery of the error occurs." (Pet. App. 26, n. 7).

However, CDSS attempted in that same policy to limit correction of underpayments in disputed cases to an unreviewable decision made by its county agents. It opposed remand of Obert's case to a state administrative law judge (ALJ) for this very reason. "In order to eliminate any confusion, [CDSS] respectfully requests that the opinion be amended to require the hearing officer to return the case to the county department to determine if there was an underpayment of benefits for the July through December 1982 period and for correction, if necessary, in accordance with County Letter 84-349-A and 9 Code Colo. Reg. 2503-1, §3.800.5 (1988)." (CDSS Petition for Rehearing, filed January 3,

1989.)

The Colorado high court declined to follow this suggestion and remanded the case to a hearing officer to make the final determination. "Consistent with our holding, any provision of County Letter 84-349-A that deprives the state hearing officer of jurisdiction to rehear Obert's claim for an alleged underpayment of benefits, is void and without legal effect." (Pet. App. 32-33). The effect of this holding was merely to conform County Letter 84-349-A to state law. Under state law, a state ALJ presides over all administrative appeals. C.R.S. §26-2-127(1)(a)(II) (1988). The ALJ makes the final agency decision for CDSS. C.R.S. §26-1-106 (1988). Any decision of a county department is not binding. C.R.S. §26-2-127(1)(c)(1982). All decisions of the state department, including final agency decisions made by the ALJ, are binding on the county departments. C.R.S. §26-2-127(2) (1982).

Thus, the only practical significance to this case is that the Colorado Supreme Court required the CDSS to make a decision on Obert's alleged underpayment at the ALJ level rather than at the lower level of the county department. This procedure is required by state law and is not inconsistent with any federal statute or regulation. In fact, federal law requires a single state agency to administer the AFDC program in each state. 42 U.S.C. §603(a)(3). The Colorado Supreme Court's opinion merely ensures uniform decision making at the state level rather than the possibility of inconsistent decision making before various county departments. The attempt by CDSS to grant its county agencies unreviewable decision making authority in underpayment cases was properly rejected by the Colorado Supreme Court on adequate independent state law grounds.

III. Only factual findings are involved in this case; the issue is not important enough to warrant review.

Petitioner maintains that the Colorado Supreme Court drew an improper distinction between termination and denial cases, on the one hand, and "underpayment" cases on the other. (Pet. 6). Such a distinction, however, is justified by the facts of Obert's case.

The facts as stated by the Colorado Supreme Court demonstrate that Obert received clear notices informing her of her appeal rights, both when her benefits were terminated in December 1982, and again when she was denied benefits on reapplication in March 1983. (Pet. App. 21-23). The adequacy of notice was not before the Court. (Pet. App. 23, n. 5.)

The record did not show, however, that CDSS ever sent Obert a notice advising her that her grant would be reduced by 74% due to its belief that Obert's father was providing her with free room and board. (Pet. App. 21, n. 2). Absent evidence of such a notice, the court was correct in distinguishing between Obert's first claim for underpayment and her second and third claims for denial and termination. Adequate notice and an opportunity for hearing are statutorily and constitutionally required in welfare benefits cases before AFDC benefits can be taken away. Goldberg v. Kelly, 397 U.S. 254 (1970); 45 C.F.R. §205.10(a)(4)(i).

Since the record demonstrates an adequate factual basis for the Colorado Supreme Court's judgment, further review by this Court is unwarranted. This case does not significantly affect the administration of the AFDC program in Colorado.

The petition does not raise a significant federal issue, and most importantly, the issues were carefully and fully addressed by the Colorado Supreme Court. There is no justifiable reason to disturb its judgment.

CONCLUSION

For these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

May 1989

APPENDIX 1

COLORADO DEPARTMENT OF SOCIAL SERVICES
1575 SHERMAN STREET, DENVER, COLORADO 80203
COUNTY LETTER FAME 84-9

NUMBER: 84-349-A

DIVISION OR OFFICE: Income and Support Services

December 31, 1984

SUBJECT

Correction of Financial Assistance Underpayments

Bureau Chief

/s/ K. Muroya

Assoc. Dir. Program Admin.

/s/ George E. Kawamura

EXPIRATION DATE: Until Superceded

Purpose

The purpose of this county letter is to clarify the rule regarding prompt corrections of financial assistance underpayments; and to provide a procedure for a correct application of the rules.

Background

It has been brought to the attention of the State Department of Social Services that some county departments may be correcting an underpayment only if the underpayment is discovered within the 90 day or 12 month reimbursement time frames. Federal regulations allow reimbursement for correction of underpayments regardless of when the underpayment occurred for both recipients or for persons who would be recipients had the underpayment not occurred. State regulations are being revised to clarify the policy for issuing retroactive payments.

Policy

Current policy as outlined in Sections 3.800.5 through 3.800.54 requires prompt action to correct an underpayment error. Section 3.800.53 specifies time frames for State reimbursement of retroactive payments and states there is no time limit for a retroactive payment if the payment is authorized as a result of an evidentiary hearing or appeal.

The rules require prompt correction of an underpayment regardless of when the discovery of the error occurs. The State Department of Social Services assigns an appeal number to authorize reimbursement of retroactive payments which exceed the 90 day or 12 month limitations.

Procedure

When the possibility of an underpayment is discovered or brought to the attention of the county department, the eligibility technician must:

a. record the date of discovery and preliminary information known;
b. investigate and verify the facts;
c. determine eligibility for the retroactive payment;
d. if an underpayment occurred, submit Form 5475, Authorization for Retroactive Payment.

If an underpayment occurred and any or all of the retroactive payment exceeds the reimbursement time limits, and prior to submitting Form 5475, the county department must:

a. submit a letter to the Income and Support Services Division, FAME Section, Room 510, requesting assignment of an appeal number. The letter must contain the following information:
   1) identification of the subject "Request for Appeal Number for Retroactive Payment Authorization;"
   2) client's name, household number and category code:
   3) a listing of the amount of payment to be authorized for each month as it will appear on Form 5475;
   4) summary of the reason for the delay or error.

b. Enter the assigned appeal number on Form 5475 and submit the authorization for payment.

Retroactive payments which cannot be processed through the computer system must be processed manually.

When the county determines that an underpayment has not occurred, the eligibility technician records the facts and basis for the conclusion in the case record. Written notification of the determination is provided to the recipients, former recipient or the representative.

If the time limit for a hearing has not expired [sic] up to (90 days from the mailing date of the prior notice for the payment in question), the client may request a hearing so that a decision regarding the alleged underpayment may be made.

If you have any questions, please contact Dixie Anderson, Jean Bress or Tom Allen at 866-2537.

APPENDIX 2

3.800.5 CORRECTION OF UNDERPAYMENTS

Rev. eff. 10/1/85 .51 The county department must take prompt action to correct underpayments to current recipients and those who would be current recipients if the error causing the underpayment had not occurred. Underpayment means a financial assistance payment(s) received by or for an assistance unit which is less than the amount for which the assistance unit was eligible, or failure to issue a financial assistance payment to an eligible assistance unit if such payment should have been issued. When the possibility of an underpayment is discovered or brought to the attention of the county department, the income maintenance staff must:

a. record the date of the discovery;
b. investigate and verify the facts;
c. determine whether an underpayment has occurred.

When it is determined that an underpayment has occurred, the county department must take action to correct the payment. The two principal means of correction are:

a. issue an additional warrant so that the payment and the authorization are in agreement;
b. issue a retroactive payment warrant when the authorization is incorrect.

Added eff. 10/1/85 When it is determined that an underpayment has not occurred the county department income maintenance staff must:

a. record the facts and basis for the conclusion in the case record;
b. notify the assistance unit in writing of the determination including the facts and basis for the conclusion;
c. send a copy of the notification letter to the State Department, income maintenance section.

When it is determined that the assistance unit is not currently eligible for assistance or would not be currently eligible for assistance if the error causing the underpayment had not occurred, the county must:

notify the assistance unit in writing that the underpayment cannot be corrected and send a copy of notification letter to the State Department, income maintenance section.

This Revision III-85-8	Last Revision: III-79-6	
Adopted: 8/2/85	Adopted: 9/7/79	Revision
Effective Date 10/1/85	Effective Date: 11/1/79	Number 1

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CLERK

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Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT

Petitioner, by and through counsel of record and pursuant to Sup. Ct. R. 22.5, respectfully submits this reply to those new issues raised in respondent's Brief in Opposition to the Petition for Writ of Certiorari to the Colorado Supreme Court.

In her brief in opposition to the petition for a writ of certiorari, the respondent argues that 42 U.S.C. § 602(a)(22) (1986) requires the states to specify statewide policies for the prompt correction of any underpayment and, therefore, the decision of the Colorado Supreme Court in *Obert v. Colorado Department of Social Services*, 766

P.2d 1186 (Colo. 1988) is correct. Respondent continues to misunderstand the position of the petitioner in this case.

Petitioner has a statutory obligation to correct underpayments. However, there is no federal or state statutory provision requiring petitioner to grant untimely requests for hearings on *alleged* underpayments. In other words, it is the petitioner's position that it is not required to grant a hearing to applicants or recipients of Aid to Families with Dependent Children (AFDC) benefits after the time periods established by state and federal regulations for requesting such a hearing have elapsed.

Respondent has not been able to cite any statutes or any cases to support her position. Although the cases cited by respondent in her brief in opposition have uniformly held that *any* underpayment must be corrected, none of the cases have addressed the issue of whether an administrative hearing must be granted where there is an untimely *claim* that an underpayment exists. It is a far reaching leap of logic to assert that, because an underpayment must be corrected where one is found, a claim of an underpayment must be set for administrative hearing, upon request, for an unlimited period of time.

Respondent's arguments that there are independent, adequate state law grounds to support the judgment of the Colorado Supreme Court and that only factual findings are involved in this case are without merit. A review of the Colorado Supreme Court's decision makes it perfectly clear that the grounds for its decision were based on what it perceived to be federal statutory requirements. Additionally, a review of the decision clearly shows

notice or lack thereof played no role in the decision. (*See* Petition for Writ, App. pp. 30-32.)

CONCLUSION

Petitioner submits that its petition does raise an important question of law which could impact all jurisdictions with AFDC programs. The petitioner respectfully requests that its petition be granted.

For The Colorado Attorney General

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